1978

Rocky Mountain Giant Tire Service, Inc. v. Brad Ragan, Inc . : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROCKY MOUNTAIN GIANT TIRE SERVICE, INC., Plaintiff-Respondent,	)	
vs.	)	
BRAD RAGAN, INC., Defendant-Appellant.	)	Case No. 15553

APPELLANT'S BRIEF

STATEMENT OF THE CASE

A. Nature of the Case.

This is an action in contract wherein the Defendant-Appellant agreed to purchase from Plaintiff-Respondent certain tires for recapping purposes. Respondent seeks recovery from Appellant in the sum of $5,575.00 plus interest and costs as payment for a portion of the subject tires which Appellant rejected as being unrecappable and of no value. Respondent does not necessarily dispute Appellant's assessment of the condition and quality of the rejected tires, but rather claims that Appellant agreed to purchase all of the subject tires without regard to inspection or fitness for recapping purposes, and, in effect, agreed to assume the risk of taking the bad along with the good.

B. Disposition in the Lower Court.

Judgment was entered for the Plaintiff-Respondent as prayed in the sum of $5,575.00 plus costs. The court also awarded Respondent pre-judgment and post-judgment interest at the respective per annum rates of 6 and 8 per cent.

C. Relief Sought on Appeal.

Appellant seeks a reversal of the trial court and judgment in its favor, as a matter of law, to the effect that the evidence and findings do not support the judgment entered below, or, in the alternative, remand the matter to the trial court for further findings of fact crucial to a proper disposition of this case as hereinafter set forth.

D. Statement of Facts.

Both parties are in the tire business. Respondent is engaged in the retail tire business. Appellant's branch in Tucson, Arizona (hereinafter referred to as "Appellant") is primarily engaged in the business of recapping and selling large truck tires used in mining operations (TR. 126, 127).

Some time prior to September of 1975, these parties entered into an oral agreement wherein Appellant agreed to purchase from Respondent certain used tires discarded at the Kennecott Copper Mine operation, with the intent of recapping them for resale to mining operations in Arizona.

Prior to shipment of the subject tires, employees of both parties looked over some of the tires at Kennecott which were potentially to become part of this agreement. Respondent claims that Appellant's employee saw 80 per cent of the subject tires on that occasion (TR. 115, ll. 28-29; 116, ll. 19-24).

Shipments began on September 16, 1975, and continued through November 6, 1975 (P. Ex. 1). The last shipment of tires arrived at Appellant's place of business prior to November 29, 1975 (TR. 121, ll. 9-19). The aggregate amount of invoices covering all 70 tires is $15,100.00.

During the period of time between October 24 and December 19, 1975, Appellant made three payments for tires received and accepted by it, and Respondent credited Appellant's account in an amount equal to the aggregate price of 11 tires, which, after inspection, Appellant rejected as being unrecappable. The aggregate sum of these three payments and credits given is $9,525.00, leaving a balance of $5,575.00. Appellant maintains that this amount covers tires which it found to be unrecappable in addition to the 11 for which credit was admittedly given. Respondent makes no contention that the disputed tires were not defective, but rather maintains that Appellant agreed to purchase them without regard to their condition. Herein lies the heart of this case, i.e., did Appellant unconditionally agree to purchase all tires which Respondent elected to ship, or did it, rather, retain the right of reasonable inspection and rejection of defective goods?

It is important to note that the used tires which are the subject of the disputed agreement are large and expensive, the average retail price of one, for example, in recapped condition is approximately $7,000.00 (TR. 129, ll. 25-30). Defects in such tires which prevent recapping are only ascertainable after each tire is subjected to certain sophisticated mechanical procedures (TR. 129, ll. 10-30.). In any event, a determination of the recappability of any such tire cannot be made by visual inspection alone (TR. 116, 3-14; 127, ll. 25-27). Appellant contends that after subjecting each tire to the necessary inspection procedures, it found many to be unrecappable which it rejected and was under no obligation to accept. It is for those particular tires that Respondent seeks payment in this action.

Some time after the last shipment of tires, Respondent's employee and only witness at trial, Ralph D. Albertson, met with Appellant's employees on or about November 29, 1975, for the purpose of ascertaining and collecting the outstanding balance of payments due on all tires subject to these transactions (TR. ll, 6-11; lll, ll. 7-8). Two important things resulted from this meeting. First, there was a discussion regarding defective tires and the manner of their disposal (TR. 122, ll. 4-20). Second, during the course of the meeting, a statement of Appellant's account was computed showing the outstanding balance to be $4,825.00 (TR. 118, ll. 12-19; 119, ll. 4-8; 120, ll. 1-14; 142, ll. 27-30; 143, ll. 1-14; 159, ll. 2-9; 162, ll. 13-26; D. Ex. 15).

Pursuant to Respondent's instructions, Appellant removed the defective tires to a local landfill at its own expense. Shortly thereafter, it received notification from Respondent to "hold all tires that you reject from this company. These tires must be rejected in the presence of both parties and proper credit invoices written." (P. Ex. 8).

Inasmuch as Appellant had already carried to a conclusion the instructions to scrap the bad tires, it sent a letter of explanation, dated December 10, 1975 (P. Ex. 10), apprising Respondent of the fact that the disputed tires were available for its inspection or use at the Tucson landfill. Respondent made no effort at this time, or on any occasion, to conduct its own inspection of those tires which were rejected by Appellant. Appellant testified, in fact, that on the occasion of November 29, 1975, it invited Respondent's employee to inspect the rejected tires; Respondent denies this, but does not aver that it was ever prevented from inspecting the rejected tires.

In short, it was clear from the outset of these transactions that the tires were to be purchased for recapping purposes. Not all of the tires were recappable. Appellant maintains that there were many defective tires in addition to those 11 for which credit was given (P. Ex. 2). Respondent did not re-inspect the bad tires following notification of their rejection, although it had opportunities to do so, and does not contend that the rejected tires were in fact recappable. Its contention is

simply once Appellant visually inspected a portion of the tires it agreed to purchase all 70 without the right to inspect them further or reject those unfit for recapping.

POINT I

THE FINDINGS OF THE TRIAL COURT DO NOT SUPPORT THE JUDGMENT ENTERED FOR PLAINTIFF BELOW, ROCKY MOUNTAIN GIANT TIRE SERVICE, INC., IN THE SUM OF $5,575.00.

Depending on one's point of view, the findings of the trial court entered in support of its judgment for Plaintiff are either fatally inconsistent or fatally incomplete. In either event, they are inadequate to support the judgment entered below.

The threshold question, and the pivotal point of this lawsuit, was correctly identified by the trial judge wherein he stated at the conclusion of closing argument, ". . .it seems to me that I have got to determine what the agreement between these parties was. . . ." (TR. 177, ll. 6-7). More specifically the issue is whether the Appellant agreed to pay for all tires shipped by Respondent, regardless of whether each tire was recappable and, therefore, of value to Appellant, or whether Appellant agreed to pay for all tires received by it from Respondent which, after inspection, were found to be recappable.

A review of the record below reveals that the trial court failed to carry to a conclusion its expressed intention of determining the nature of the agreement as between these parties as to this particularly crucial issue. No finding was entered

below as to whether or not the sale of the subject tires was conditioned upon their fitness for which they were purchased, i.e., recapping.

In deference to the trial court and the prevailing party below, it may be argued that inasmuch as the evidence, findings and judgment below must be viewed in the light most favorable to Respondent and every reasonable inference favorable to Respondent must be drawn therefrom, Kimball Elevator Co. v. Elevator Supplies Co., 2 Ut.2d 289, 272 P.2d 583 (1954), one must conclude that the trial court inferentially found the subject agreement to be unconditional to the exclusion of the buyer's right of reasonable inspection and rejection of non-conforming goods. The supportive reasoning for this argument would be that the trial court found (1) that ". . .the defendant purchased from the plaintiff a quantity of used tires for an agreed total purchase price of $15,100.00. . . ." (TR. 82, Findings of Fact #3); and (2) that after subtracting all payments and credits from the foregoing amount there remained unpaid the sum of $5,575.00 (TR.83, Findings of Fact #4); therefore, the court inferentially found that Appellant agreed to take the "bad apples" along with the good ones and pay for them all.

Although this reasoning and conclusion may have some limited persuasive appeal at first blush, a serious consideration of the record below shows that it is not only unsupported by the evidence, as set forth in Point II hereafter, but such an

inference is precluded by the express findings of the court. A further refinement of the aforementioned standard of review is that a missing finding of fact can be implied if its implication would be in harmony with the other express findings. Northern Oil Co. v. Industrial Commission, 140 P.2d 329 (1943). To infer that the agreement was unconditional and that the purchase of the tires in question was not made subject to the right of reasc inspection and the right to reject defective goods, is to draw an inference which is incompatible with the express finding of the court that

> . . .[O]n November 10, 1975, the plaintiff issued a credit to the defendant for 11 of said tires shipped by plaintiff to defendant as aforesaid on November 6, 1975; that said credit for $2,375.00 was for such 11 tires found to be unuseable and rejected by defendant through its manager in Tucson, Arizona. (TR.82, Finding of Fact #3.)

Certainly it cannot be said or reasonably inferred from the evidence and other findings of the court below that the purchase of tires was not made subject to the right of inspecti and fitness of goods while at the same time expressly admitting that the Respondent agreed to, and did in fact, credit the Appellant's account for the defective tires.

POINT II

THE EVIDENCE ADMITTED BELOW DOES NOT SUPPORT THE FINDINGS OF THE TRIAL COURT.

The Standard of Review

If the express findings of fact of the trial court are disregarded and the blind inference drawn that Appellant agreed to purchase the subject tires from Respondent without regard to their condition and without the right of reasonable inspection, then we must turn our consideration to the evidence, if any, in support of such inference. A finding whether express or implied cannot stand without adequate basis in the evidence.

In contrast with other jurisdictions, such as Arizona, California, Colorado, Kansas, Oklahoma and Oregon, which merely require "some or any evidence" to support the findings of the trial court on appeal, (3 Pacific Digest "Appeal & Error", hn. 1010.1(3), supp.) this court has established a somewhat higher standard of review regarding the quantum and quality of evidence required to support findings of fact challenged on appeal. This rule is simply that the findings and judgment of the trial court will not be disturbed on appeal if there be substantial and competent evidence in the record to support them. Mineer v. Board of Review of Industrial Commission, 572 P.2d 1364 (Ut. 1977); Ash v. State, 572 P.2d 1374 (Ut. 1977); R. C. Tolman Construction Co., Inc. v. Myton Water Association, 563 P.2d 780 (Ut. 1977); Dockstader v. Walker, 29 Ut.2d 370, 510 P.2d 526 (1973). On another occasion, this court referred to "this same well-worn and time-honored rule of review. . ." in similar but somewhat different language by stating that where there

was "substantial, reasonable and credible evidence" to support the trial court's findings, a reviewing court will not upset them on appeal. Keller v. Deseret Mortuary Co., 23 Ut.2d 1, 455 P.2d 197 (1969).

The Evidence

The evidence submitted at trial is insufficient to support either an implied finding of fact to the effect that the purchase agreement was unconditional, or the express findings that the agreed total purchase price was $15,100.00 (TR. 82, Finding of Fact #3) and that, ". . .there remains due and owing from the defendant to the plaintiff the sum of $5,575.00." (TR.83, Finding of Fact #4). With respect to the evidence in this regard, there are six important points to take into consideration.

First, the Respondent established by its own evidence (P. Ex. 2) and the court found (TR.82) that on November 10, 1975, the Respondent credited the account of Appellant for 11 tires which Appellant inspected and found to be unrecappable. Obviously, Respondent would not have allowed a credit for bad tires if the agreement required Appellant to pay for all tires, whether good or bad, and, for the sake of argument, even if the original agreement had been unconditional, Respondent's conduct in giving credit for bad tires modified the original agreement to the effect of making it conditional upon inspection and fitness for recapping. In this regard, it is important

to understand, that more than the 11 tires covered by this credit were found to be unrecappable. In fact, all of the tires subject to the judgment entered herein for the sum of $5,575.00 fall into that category. (TR. 173, ll. 11-14.)

Second, on November 29, 1975, Respondent met with Appellant in Tucson, Arizona. In regard to that meeting, Respondent's witness, along with Appellant's witness, testified that Respondent instructed and authorized Appellant to dispose of any and all bad tires.

Q. (By Mr. Lewis) All right. Now, let me review this conversation that you had with Mr. Murken in Arizona November 28th, 29th. Do you recall in that conversation in which Mr. Murken told you that all of the tires, the rejected tires were right there in the lot and you could go inspect them and you said, "No, I don't need to inspect them," basically and then he said, "Shall we discard them?" You said, "Go ahead and discard them." Do you recall that conversation?

A. Only part of it.

Q. All right. Tell me which part you remember.

A. The part of discarding the tires.

Q. And you -- did you tell him to go ahead and discard the tires?

A. The ones that were junk, if there were any.

Q. All right. So if there were junk tires you told him to go ahead and discard them?

A. If there were any, yes.
(TR. 122, ll. 4-21.)

Respondent's instruction and authorization to Appellant to discard the bad tires is again indicative of the fact that both parties understood the sale to be subject to reasonable inspection and the right of rejection for defective goods. It should also be noted that once Respondent gave instructions to discard the bad tires, Appellant had no other alternative but to comply. 70A-2-603(1) U.C.A. (1953, as amended) provides:

> Subject to any security interest in the buyer (subsection (3) of section 70A-2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods. . . . (Emphasis added.)

Third, pursuant to Respondent's testimony, the purpose of the meeting of November 29, 1975, was to determine and collect the balance of the unpaid purchase price for the subject tires from Appellant (TR. 118, ll. 6-11; TR. 188, ll. 2-4). This accounting was final inasmuch as Appellant had received from Respondent shipment of all of the subject tires prior to that occasion (TR. 121, ll. 2-21; TR. 140, ll. 1-3). On that occasion, these parties mutually agreed that the remaining balance on the unpaid purchase price was $4,825.00 (TR. 119, ll. 4-8; TR. 120, ll. 12-14; TR. [illegible] ll. 17-19). Accordingly, on that same occasion, these parties prepared an accounting of all billable tires (D. Ex. 15) (TR. [illegible] ll. 29-30; TR. 159, ll. 1-9; TR. 142, ll. 15-30).

It is obvious that the final accounting of billable tires as represented by Defendant's Exhibit 15, did not account for all tires shipped and invoiced by Respondent. In fact, a

quick tally of tires accounted for by Defendant's Exhibit 15 equals 35, whereas Respondent shipped and invoiced 70 tires (P. Ex. 1). The fact that this accounting did not cover all of the tires shipped regardless of their condition is further evidence that Appellant was not to be held liable for those tires found to be unrecappable after adequate inspection procedures.

Fourth, within a week following the meeting of November 29, 1975, Respondent sent a letter (P. Ex. 8) dated December 5, 1975, which stated:

> Please be advised to hold all tires that you reject from this company. These tires must be rejected in the presence of both parties and proper credit invoices written.

Because of the anticipatory language of this communication, it is clear that it refers to bad tires in addition to and apart from those 11 already covered by Respondent's credit memorandum of November 10, 1975 (P. Ex. 2). The expressed intent of Respondent therein is to inspect tires rejected by Appellant and prepare "proper credit invoices" for those additional tires that were unrecappable.

This communication of December 5, 1975, also shows the nature of the agreement as between these parties, i.e., that the purchase of tires by Appellant was subject to reasonable inspection and conditional upon their fitness for recapping purposes. Respondent clearly expressed its intention therein to accommodate the Appellant with "proper credit invoices" for all bad tires.

Fifth, because of the size and kind of tires involved a determination cannot be made as to whether or not a particular tire is recappable without first subjecting the tire to sophisti inspection procedures. The undisputed evidence submitted to the trial court in this regard established that the old rubber must first be removed by a de-treading machine, some times known as a "buffer". At this point a visual inspection is made primarily to determine how many cord bodies are exposed. If the tire passes this first step, it is then placed in an open steam kettle for a couple of hours and again inspected for separations. At this point, a final determination is made as to whether or not the tire is recappable. (TR. 129, ll. 7-2

In any event, both parties agree that the recapping potential of these tires is not subject to evaluation by visual inspection, but requires the assistance of the mechanical proced described. (TR. 116, ll.3-14 - Respondent; TR. 127, ll. 24-30 - Appellant)

Because of the difficulty in determining the recappin potential of one of the subject tires, the trial judge erred in analogizing the transaction between these parties to the sale and purchase of a carload of apples (TR. 176, ll. 28-30; 177 ll. 1-2). Whereas, the quality and fitness of apples for any particular purpose can readily be determined by visual inspection, the goods in this case are clearly of a different nature and are not so easily inspected.

Respondent also testified that when Appellant's representative was in Utah to negotiate the terms of this purchase agreement, he didn't bother to even look at all of the tires that were to potentially become part of the sale (TR. 116, ll. 19-24). That fact, coupled with the requisite inspection procedures and Respondent's lack of equipment to conduct such inspections in Salt Lake City, Utah (TR. 20, ll. 10-14), are clearly indicative of the fact that Appellant never intended to bind itself to purchase all tire which Respondent elected to ship; if that were the case, Appellant would have at least looked at every tire it was to become obligated to purchase.

Sixth, Appellant's witness testified as follows:

> Q. [Appellant's counsel] Now, do you recall any conversation with Mr. Albertson [Respondent's employee] regarding your inspection of the tires?
>
> A. All tires were subject to inspection and that was the conversation that was understood by both parties, that there was no way he could receive monies from Brad Ragan without the tires being inspected.
> (TR. 128, ll. 28-30; 129, ll. 1-3; see also TR. 127, ll. 13-19; 128, ll. 24-27.)

On the other hand, the only scrap of evidence in support of Respondent's contention that the subject purchase agreement was unconditional was the self-serving testimony of its only witness.

> Q. [Appellant's counsel] And that's why they took these tires to inspect them and determine if they are recappable?
>
> A. He bought them as is here with his inspection and my inspection.

Q. Then is it your testimony that the two of you went over all the tires or only a portion of the tires?

A. I said 80 per cent of the tires.

Q. And do you want this court to believe that 20 per cent of the tires he bought sight unseen?

A. Correct.
(TR. 116, ll. 15-25)

Appellant contends that the trial judge failed to make the important finding of fact as to the primary issue of this case regarding whether or not the purchase agreement was conditi upon inspection and fitness of the tires. That finding cannot b inferred from the decision of the trial court, and at the same time find harmony with the express findings entered below. But, even if such a finding could be implied, or if the express findi were given that effect, which Appellant contends cannot reasona be done, the evidence is nevertheless insufficient to support such a finding whether express or implied as shown by the foregoing six points.

Lest there be any misunderstanding, this Appellant does not ask the court to rule in its favor merely because the evidence preponderates against the Respondent on this issue but, rather, because there is no substantial and competent evidence to support a finding, whether express or implied, that the subject purchase agreement was unconditional. It should also be mentioned that not only does the evidence show

that the parties intended for the sale to cover only those tires which were, in fact, recappable, but the controlling law protects Appellant's right of reasonable inspection and rejection of non-conforming goods as well. In this regard, 70A-2-513(1) and (4), U.C.A. (1953, as amended), states:

> Unless otherwise agreed and subject to subsection (3), where goods are tendered or deliveredor identified to the contract of sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival. ***
>
> (4) A place or method of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition failure of which avoids the contract.

Comment No. 2 of the Official Comments of the Uniform Commercial Code §2-602, adopted in this jurisdiction as 70A-2-602 U.C.A., also states that the buyer's right to receive conforming goods implies a right of reasonable inspection. If after inspection the buyer (in this case Appellant) discovers some of the goods to be defective, his right of rejection of all or part of the goods is protected by §70A-2-601:

> Subject to the provisions of this chapter on breach in installments contracts (section 70A-2-612) and unless otherwise agreed under the sections on contractual limitations of remedy

(sections 70A-2-718 and 70A-2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

(a) reject the whole; or
(b) accept the whole; or
(c) accept any commercial unit or units and reject the rest.

The Conditional Agreement

If one concludes as the Appellant contends that the agreement was conditional, and that there is no substantial competent evidence to support a finding whether express or implied that the agreement excluded the rights of reasonable inspection and rejection of defective goods, three additional questions must then be addressed:

(1) Other than the 11 defective tires covered by Respondent's credit memorandum of November 10, 1975, were there additional defective tires received by Appellant from Respondent?

(2) If so, did Appellant properly notify Respondent of the same and provide an opportunity for their inspection?

(3) Did Appellant pay Respondent for all recappable tires which it received?

(1) There were many defective tires in addition to those 11 for which credit was properly given. In fact, all of the tires which constitute the goods covered by the trial court's judgment for $5,575.00 were not recappable. Respondent shipped 70 tires (P. Ex. 1). Only 35 of those proved to be recappable (D. Ex. 15 and 13). It is undisputed that the 11 tires covered by Respondent's credit memorandum of November 10, 1975, were

defective. There is no evidence in the record to show, however, that all of the balance of the tires were recappable. In fact, all of the evidence on this point was to the effect that many of the tires subject to these transactions were defective. Defendant's Exhibit 15 constituted a final accounting of all billable tires which obviously covers only half of the 70 tires shipped. Defendant's Exhibit 13 shows the inspection history and disposition of each individual tire. Half of these tires were found to be defective. Respondent's instruction and authorization given to Appellant to scrap the defective tires as before described, along with the correspondence between the parties as reflected in Plaintiff's Exhibits 8 and 10, establish that both parties were aware of a number of defective tires in addition to those covered by the credit memorandum.

(2) Appellant gave proper notice of its rejection of all defective tires and provided Respondent opportunities to inspect them. Respondent complained at trial that Appellant did not notify it of the number of defective tires until the meeting of November 29, 1975 (TR. 175, ll. 17-22). To that one must ask "So what?" The undisputed fact is that Respondent was given notice on November 29, 1975, which was rather prompt given the number of tires involved (70), the fact that shipments of tires were still being made in that same month (P. Ex. 1), and considering the nature of the inspection procedures

involved. In any event, there is no evidence in the record as to any obligation on the part of Appellant to provide writt or more prompt notice than that which was in fact given in this case. The controlling statute regarding rejection of goods states:

> Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller." §70A-2-602(1)

It cannot be reasonably said in this case that the notice given on November 29, 1975, within a few weeks of the la shipment, was less than "seasonable."

Respondent was indisputably put on notice in this regard on November 29, 1975. On that occasion Appellant prepar and submitted to Respondent's employee its final accounting of billable tires (D. Ex. 15), which obviously excluded many of the tires shipped (TR. 159, ll. 26-28), and they specifically discussed the matter of defective tires and their disposal.

Appellant also testified that it submitted a worksh (D. Ex. 13) on each tire to Respondent showing the inspection results; this, however, it denied. Respondent further denied that it was invited to inspect the defective tires on that occasion as Appellant alleged, but Respondent suggests neither that its employee requested an opportunity to inspect nor was prevented from inspecting the defective tires which the parties admittedly discussed on that occasion. Appellant further infor Respondent as to the location of all defective tires in order

to faciliate their inspection by Respondent by its letter of December 10, 1975 (P. Ex. 10).

The fact is that Appellant did absolutely everything within its power to put Respondent on notice as to the number of defective tires and to facilitate Respondent's inspection of them.

Nevertheless, Respondent did absolutely nothing to inspect or double-check those tires which Appellant had rejected as being unrecappable. The tires were not destroyed and were available for inspection at all times.

Once seasonable notice of rejection was given it became incumbent upon Respondent to conduct its own inspection in order to assure itself as to the condition of the tires or forego the right to claim that they were good and demand payment for the same. It was Respondent's own failure to act in this regard that placed itself and Appellant in the present situation, of which Respondent should not now be allowed to take advantage. Otherwise, it will always be in the interests of one in Respondent's position to refrain from acting, thereby enabling one to claim "as far as we knew the goods were fit for the purpose for which they were sold." It should not be allowed to better its position to the detriment of Appellant because of its own failure to act.

(3) Appellant made payment in an amount $50.00 short of full payment for all recappable tires. The evidence shows

that on November 29, 1975, the parties determined the outstandi balance of payment to be $4,825.00, which did not take into account a check which was in the mail for the sum of $2,025.00 (D. Ex. 9). Plaintiff subsequently issued a check for what it calculated the balance to be in the sum of $2,750.00 (P. Ex. A recomputation of this accounting shows Appellant to have been in error in the sum of $50.00. To that extent, and to that extent only, Respondent is entitled to judgment.

The Unconditional Agreement

Although Appellant maintains (1) that the court did not make a finding of fact as to the important issue regarding the nature of the subject agreement, (2) that the express findi do not permit an inference in Respondent's favor to the effect that the agreement was unconditional, and (3) that the evidence does not support such a finding whether express or implied, consideration should be given to the other side of this argumen Suppose, for the sake of argument, that the original agreement was unconditional and Appellant neither had the right of reasonable inspection nor the right of rejection of goods unfit for the purpose for which they were purchased; nevertheless, on November 29, 1975, these parties negotiated the final balan owing on Appellant's account to be $4,825.00 for all tires shipped. Appellant paid all but $50.00 of this amount.

As mentioned before, Respondent's employee traveled to Tucson, Arizona, and on that occasion met with Appellant's representatives for the express purpose of collecting the unp

balance of the purchase price for the subject tires. One would fully expect, and the evidence shows, that after traveling a thousand miles, Respondent would at least identify the balance of the total debt due. That sum was calculated by these parties to be $4,825.00.

The Respondent's testimony on this point was as follows:

Q. [Respondent's counsel] And in connection with that [payment of money owed] you had discussed with him [Appellant's employee, Arlo Murken] sending you a check for forty-eight twenty-five?

A. Correct.
(TR. 111, ll. 10-12)

Q. [Appellant's counsel] Wasn't there any question as to the amount of the tires that were received and the amount of the tires for which payment allegedly was due?

A. The only thing I was looking for was the balance of the money due on the invoices. He and I did not inspect the tires down there at all.

Q. Now, how did you arrive then at the figure that you said was due and owing of forty-eight hundred plus dollars?

A. Mr. Murken and I agreed on each individual tire price here and we wrote it up on the invoice as such and he accepted it that way.

Q. And so you agreed at that time that there was due and owing 4,825 dollars?

A. An approximation, yes.
(TR. 118, ll. 6-19)

Q. So at the time you were in Arizona which would be October or November the 28th, 29th, in that area, you agreed that the

amount owing to you was four thousand eight hundred and twenty-five dollars?

A. Right.
(TR. 119, ll. 4-8)

During the trial both counsel and the trial judge disagreed as to what Respondent's witness had said in his prior testimony respecting this point. Both the court and counsel for Respondent contended that the witness had not testified that he had agreed that the balance of the unpaid purchase price as $4,825.00. The following clarification was then immediately made by Respondent's own witness:

MR. LEWIS: They agreed four thousand eight hundred twenty-five dollars was owing.

THE COURT: I didn't understand him to say that.

MR. LEWIS: Let me ask the question.

Q. (Mr. Lewis) Isn't it true at that time you agreed that's what was due and owing?

A. Yes.
(TR. 120, ll. 8-14).

In the interest of fairness, Appellant must represent to this court that notwithstanding the foregoing substantial testimony of Respondent on this particular point, its witness did change his testimony on this point following the noon recess (TR. 164, ll. 8-12) Appellant maintains, however, that Respondent's change of story and self-serving testimony late in the trial is not only highly suspect but insufficient to rebut its own prev

testimony on this point, given at least at three different times in the trial. This is especially evident in light of the fact that the comparatively substantial testimony given in this regard was in response to questions from both counsel and at one point followed a very clear argument to the point between counsel and the court as to whether or not Respondent had agreed to accept this sum as full payment; Respondent then again testified that $48,25.00 was agreed upon as the amount owing.

It was also clearly established by Respondent's evidence that all tires which it had shipped had been received by Appellant prior to the November 29, 1975 meeting. In this regard, Respondent's witness testified that he was sure the tires had arrived prior to that occasion (TR. 121, 17-19). Plaintiff's Exhibit 1 shows that the last invoice is dated November 6, 1975 and Respondent's witness testified that shipment would have been within a "day or so" following the day of the invoice (TR. 121, ll. 5-8). In other words, there was no serious contention that the accounting of November 29, 1975 was made prior to shipment or receipt of all of the subject tires.

Plaintiff's Exhibit 6, a routine end-of-the-month statement of account, is of no significant consequence. There is no evidence in the record as to who prepared this statement, and certainly it could not have been prepared by Respondent's witness, Mr. Albertson, inasmuch as his own calendar (P. Ex. 16)

shows that he was either in Tucson, Arizona, or returning home therefrom on the date of said statement. There is no evidence as to whether the statement was sent to Appellant or whether it was received by Appellant. In any event, it appears to be a routine monthly billing prepared without knowledge of the accounting and agreement struck between these parties on November 29, 1975.

Finally, there is no dispute as to the fact that Appellant made payment on all but $50.00 on the unpaid purchase price as agreed on November 29, 1975. on that occasion, the parties prepared Defendant's Exhibit 15 showing the unpaid balance in the sum of $4,825.00, which failed to take into account Appellant's check in the sum of $2,025.00 (P. Ex. 3). Consquently, Appellant issued a check in the sum of $2,750.00 (P. Ex. 5) with a letter of explanation dated December 5, 1976 (P. Ex. 9). With those payments Appellant paid its account balance down to $50.00.

POINT III

THE EVIDENCE AND FINDINGS OF FACT OF THE TRIAL COURT DO NOT SUPPORT A JUDGMENT ASSESSING INTEREST AGAINST APPELLANT ON THE AMOUNT OF THE JUDGMENT AT THE RATE OF 6.00 PER CENT PER ANNUM FROM DECEMBER 19, 1975, AMOUNTING TO $641.13 WITH INTEREST ON THE TOTAL JUDGMENT AT THE RATE OF 8.00 PER CENT PER ANNUM FROM THE DATE OF SAID JUDGMENT.

The record is absolutely devoid of any proof or evidence or request of any kind that interest be assessed at the rate of

6.00 per cent per annum from December 19, 1975 to the date of the judgment. Respondent neither prayed for such relief in its complaint nor requested the same at the time of trial.

Furthermore, although Respondent did pray in its complaint for interest to be assessed on the judgment, no proof or evidence was profered at the time of trial in support of its right to claim such relief. Appellant submits that the trial court erred in unilaterally granting such relief without any basis of foundation whatsoever in the record.

CONCLUSION

In summary, Appellant respectfully submits that the trial court erred in the following particulars:

1. No finding was made as to the central issue of fact regarding the nature of the underlying agreement, i.e., did Appellant unconditionally agree to purchase any and all tires which Respondent choose to ship without even seeing all of them and without the right to inspect and reject those which were not fit for the purpose for which they were purchased, or did Appellant agree to purchase only those tires which were recappable.

2. The evidence and express findings of fact do not support or permit an inference to be made that the underlying agreement was unconditional in nature.

3. As a matter of law, Appellant retained the right of reasonable inspection of all tires to ascertain their fitness for recapping and to reject those which were unrecappable.

4. In addition to those 11 defective tires covered by the credit memorandum of November 10, 1975, there were defective tires for which no credit was given.

5. Appellant gave Respondent proper notice of its rejection of those defective tires and provided every opportunity for Respondent to inspect them. Although Appellant did everything it could have done under the circumstances, Respondent simply elected not to inspect those tires which Appellant found to be defective, and, in fact, authorized Appellant to dispose of the defective tires at Appellant's will

6. Appellant owes only $50.00 on its account with Respondent for the tires it agreed to purchase.

7. Assuming, for the sake of argument, that the subject agreement was unconditional, as Respondent contends, these parties agreed upon the sum of $4,825.00 as the remaining balance due and owing for all tires. Appellant paid all but $50.00 of this amount.

8. The trial court erred in granting Respondent relief in the nature of pre-judgment and post-judgment interest without any support in the pleadings of evidence whatsoever.

Respectfully submitted,

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I hereby certify that I mailed two copies of the foregoing Appellant's Brief to F. Robert Bayle, Attorney for Respondent, 1105 Continental Bank Building, Salt Lake City, Utah, postage prepaid, this 4th day of April, 1978.